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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re

Review of the Prime Time
Access Rule, Section
73.658(k) of the
Commission's Rules

MM Docket No. 94-123

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COMMENTS OF CBS INC.

Ellen Oran Kaden
51 West 52 Street
New York, New York 10019

Mark W. Johnson
Suite 1000
1634 I Street, N.W.
Washington, D.C. 20006

Its Attorneys

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking ("Notice" or "NPRM") in the above proceeding.

The Commission has initiated this proceeding "to assess, in light of current economic and technological conditions, the legal and policy justifications for the Prime Time Access Rule ..., and to consider the continued need for the [R]ule in its current form." (Notice at ¶1)¹ The Notice sets forth a comprehensive analytical framework that is intended to permit rigorous analysis of the competitive effects of the Rule and its efficacy in achieving its stated objectives (¶3), as well as an assessment of whether the Rule's "intended and unintended effects further the attainment of legitimate goals in today's world." (¶32) CBS agrees that

¹ Textual citations to the Notice hereafter appear as (¶).

The Prime Time Access Rule ("PTAR" or the "Rule"), 47 C.F.R. §73.658(k), generally prohibits television stations in the top 50 television markets which are affiliated with CBS, Capital Cities/ABC, Inc. ("ABC") or the National Broadcasting Co., Inc. ("NBC") from broadcasting, during the four prime time viewing hours, more than three hours of programs currently or previously supplied by one of those three networks. Id. Although the Rule does not so prescribe, the first hour of prime time, known as the "access" period, is generally the period in which the three affected networks do not supply network programming to their affiliates.

reexamination of PTAR in light of current marketplace conditions is fully warranted, and indeed, long overdue.

The Commission has solicited from commenters "economic and other data and analysis" that would assist it in evaluating the Rule within the analytical framework outlined in the Notice. In response to this request, an economic study prepared for this proceeding by Economists Incorporated is being submitted today on behalf of ABC, CBS and NBC.² As the Notice indicates, the adoption of PTAR rested on the twin premises of "network dominance" of the program production market, and "network control" over the programming decisions of network affiliates (§1) -- hypotheses which furnished the basis not only for this Rule, but for an array of regulations directed specifically, and exclusively, at ABC, CBS and NBC. The Joint Economic Study examines in detail both the current viability of these original premises for special regulation of three network companies, and the specific issues relating to PTAR raised in the Notice. The data and analysis provided in the Joint Economic Study furnish the context and underpinning for the Comments set forth below.

² "An Economic Analysis of the Prime Time Access Rule," Economists Incorporated (March 7, 1995) (hereinafter "Joint Economic Study").

Introduction and Summary

Twenty-five years ago, the Commission imposed a competitive handicap on the three original broadcast networks and their affiliates in order to nurture the first-run syndication business and reduce perceived "network dominance" over network-affiliated stations. (¶¶1 & 31) That PTAR has had the effect of strengthening the position of the advantaged competitors at the expense of those it has constrained cannot be doubted. In CBS's view, the central question a quarter-century later is "the extent to which the [R]ule serves the Commission's 'public interest' mandate to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry." (¶32) CBS submits that, in the light of the rigorous economic and policy analysis the Commission has called for in this proceeding, the Rule cannot be justified, and should promptly be repealed in its entirety.

As the Commission states, two factors lie "at the heart" of its current inquiry: (i) the dramatic change in the number of participants in the television broadcast industry and "in the competitive environment in which broadcast television operates -- the broader video marketplace"; and (ii) the impact of this change "on the effectiveness and continued advisability of PTAR." (¶10) With respect to the first point, little need be added to the list of momentous marketplace changes summarized in the NPRM, and more fully set forth in various recent Commission orders and reports.³ The extraordinary transformation of the

³ See, e.g., Second Report and Order in MM Docket No. 90-162, 8 FCC Rcd 3282, recon. granted on other grounds, 8 FCC Rcd 8270 (1993) ("1993 Fin/Syn MO&O"); Setzer and Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper No. 26, 6 FCC Rcd 3996 (1991) ("OPP Working Paper"); and First Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48, released September 28, 1994.

competitive environment for broadcast television since 1970, described once again in detail in Section II of the Joint Economic Study, is by now so well-documented as to be incontrovertible, and so far-reaching as to constitute presumptive evidence for leveling, at last, the regulatory playing field.

In brief: since 1970, there has been a seven-fold increase in the number of broadcast television stations not affiliated with the three original networks, and a vast expansion both in the number of cable subscribers and in the number of cable channels available to the average home. Accompanying the extraordinary growth in outlets has been a similar dramatic growth of new video distributors -- new broadcast networks, cable networks, syndicators, and nonbroadcast video distributors. The result, in a word, is a transformed video marketplace in which demand for programming has exploded, and the original networks' combined shares of audience and of advertising revenue have dramatically declined. At the same time, there has been a sea change in the "balance of power" between broadcast networks and their affiliates.

Superimposed on this revolutionized marketplace is PTAR, an economic regulation whose purpose and effect is to deny to one group of competitors opportunities available to all others. For present purposes, we pass the point, extensively documented but often inexplicably overlooked, that the three disfavored networks are themselves, and always have been, fierce competitors, and that none has ever achieved, under any standard of measurement, a dominant position in program selection, distribution or production.⁴ At present, the other competitors -- those favored by a protected marketplace -- prominently include Fox Broadcasting Company and Twentieth Television (Fox's syndication arm), entities

⁴ See generally Joint Economic Study, Part II.

powered by the resources of a \$12 billion international media conglomerate;⁵ the television broadcast stations owned by or affiliated with Fox; independent stations owned by major media companies; a dominant "independent" first-run syndication company, King World; and two "emerging" networks recently launched by companies which describe themselves, respectively, as "the largest media and entertainment company in the world",⁶ and "a single, incomparable global media colossus."⁷

Even if PTAR had served its original purpose, the vast increase in overall diversity resulting from the technological and marketplace changes since 1970 -- changes wholly unrelated to PTAR -- would render the micromanagement that is the essence of the Rule unnecessary and unjustified. But in fact, PTAR has not produced the hoped-for diversity in program content or program sources in the "access" period. "Access" program supply is today dominated by three companies -- Fox, Paramount and King World -- two of which are also major suppliers of prime time network programming. And the overwhelming majority of syndicated "access" programs on top-50 market network affiliates are either game or "reality" shows that are "stripped," with the result that only a few such syndicated programs are available to viewers at any time in a given market. Under these circumstances, the Commission need not make inappropriate value judgments as to program quality to decide now that its 1970 regulatory intervention "to make available an hour of top-rated evening time

⁵ The Bloomberg, March 2, 1995.

⁶ Time Warner Inc., Report on Form 10-K of the Securities and Exchange Commission (March 31, 1994).

⁷ Broadcasting and Cable, October 3, 1994 at 64 (statement of Sumner Redstone, Chairman, Viacom Inc.).

for competition among present and potential non-network program sources ... so that the public interest in diverse broadcast service may be served"⁸ was unwarranted and unsuccessful.

At the same time, marketplace and technological changes have so altered the relationship between the three original networks and their respective affiliates that "network dominance" over affiliate programming decisions can no longer be deemed even a plausible basis for retaining PTAR. As the Joint Economic Study decisively demonstrates, this hoary concept, whatever its original merit, has absolutely no economic justification at the present time. CBS envisions no scenario in the near term in which the CBS Television Network and its affiliate body would reach the consensus necessary to expand the present prime time network program schedule. We believe, however, that continued government interference in these programming decisions reflects a misplaced and insupportable view of the role of the original networks and their respective affiliates in the overall video distribution marketplace. Simply put, an anticompetitive regulation for which there is no articulable economic rationale should be repealed.

Similarly unpersuasive is the more recently proffered argument that PTAR should be perpetuated because it subsidizes "independent" stations and, indirectly, certain proposed new broadcast networks. (¶45) The cited subsidy takes the form, among others, of below-market prices to stations not affiliated with ABC, CBS or NBC for off-network programming for the access period. This subsidy is provided by the government at the expense of producers of network programming, who are prevented from realizing full value for their product, and at

⁸ Report and Order in Docket No. 12782, 23 FCC 2d 382, 397 (1970) ("PTAR I").

the expense of network affiliates, who are prohibited from programming their own access periods most efficiently. Regulatory favoritism of this magnitude plainly requires powerful justification, and the economic fact of the matter is that almost no independent station in the top-50 markets needs such a subsidy for its continued health or survival. Virtually all such stations are either affiliated with Fox; members of substantial regional or national station groups; current or likely affiliates of the two new deep-pocketed networks; or stations with religious, home-shopping or foreign language formats that are not in the market for off-network access programming.⁹ In any event, in light of the substantial growth of independent stations in markets below the Top 50 (where the PTAR subsidy for off-network programming does not operate), as well as the incontestable role of cable and other factors in ameliorating any original UHF technical handicap, PTAR can claim neither credit nor responsibility for the growth or survival of independent stations.

It is natural and predictable for those who would face new competition in previously protected markets to try to stave it off. This instinct doubtless explains the recent unsuccessful effort by some parties to complicate and defer action on PTAR by urging that this proceeding be denoted an "inquiry," so that yet another, later proceeding would be necessary before the Rule were modified or repealed.¹⁰ It also explains the plea that this proceeding be deferred until after the upcoming final review of the Commission's existing

⁹ Given the recent upheaval in network/affiliate relationships described infra, some of these independent stations are becoming affiliates of the three original networks, or are being purchased and upgraded by those network companies.

¹⁰ Comments of King World Productions, Inc., MM File No. 870622A et al., June 14, 1994 at 18.

decision to eliminate the financial interest and syndication rules.¹¹ Both efforts serve no purpose other than needless delay.

It is not conceivable that, as an original proposition, PTAR would be proposed, much less adopted, under the marketplace and technological conditions which exist today. It is now an unfair and unneeded regulatory relic. CBS respectfully submits that after reviewing the argument and analysis elicited by this NPRM, the Commission should proceed promptly to repeal the Rule.

I. PTAR Has Not Increased, And Cannot Increase. The Opportunities For Independent Programmers on Top-50 Market Network Affiliates.

One of the original purposes of PTAR was "to provide healthy impetus to the development of independent program sources".¹² In 1970, credit for "source diversity" on network affiliates' schedules was ascribed only to programming distributed to affiliates outside of the so-called "network funnel." At that time, the Commission apparently assumed that a network "controlled" all programs which were initially distributed through the network/affiliate system -- i.e., the "funnel" -- and which were not supplied by advertisers. This notion was consistent with a presumption of "network dominance" of television program acquisition and distribution that underlay not just PTAR and the Financial Interest and Syndication Rules, but a whole host of special rules dating back to the 1941 "chain

¹¹ Comments of the FBC Television Affiliates Association, MM File No. 870622A et al., June 14, 1994 at 11.

¹² Notice at ¶12, citing PTAR I at 395.

broadcasting" regulations.¹³

The misconception underlying the old presumption of network dominance apparently continues. For example, in its description of the history of PTAR, the Notice states that "[i]ndependent producers, who provided approximately one-third of the evening network schedules in 1957, provided less than 4 percent in 1968."¹⁴ This statistic in fact refers to a change in network television program supply that was wholly unrelated to the issues involved in this proceeding. In 1957, advertisers often supplied solely-sponsored programs to a network for initial distribution, and the advertiser retained the copyright. By 1968, programs were generally supported by "spot" advertising and were often supplied by Hollywood studios which retained the copyrights (with or without participation by the networks in "back-end rights"). The statement in the Notice appears to assume, incorrectly, that the advertiser-supplied programs were "independently" produced, while the Hollywood-produced programs were "controlled by networks," even when the studio owned the copyright.

It is now settled that the only useful measure of the source diversity of network's prime time schedule is copyright ownership.¹⁵ The concept of a "network funnel" has become irrelevant because it is now recognized that networks acquire their programming in a competitive marketplace. This more accurate description of "independent producer" must be

¹³ All but one of those rules were repealed for radio networks and their affiliates in 1977. Network Broadcasting by Standard (AM) and FM Broadcast Stations, 6 FCC 2d 674 (1977).

¹⁴ Notice at ¶13, citing PTAR I at 385-91.

¹⁵ 1993 Fin/Syn MO&O at 3310. "Moreover, focusing on the legal owner of the program is consistent with the Commission's historic approach to diversity in other contexts." Id. at n. 66.

borne in mind as the Commission analyzes PTAR's effect on program and source diversity in the "access" period from 1970 to the present.¹⁶

Broad data on the current access period marketplace in the top-50 markets is already in the record of this proceeding and is summarized in the NPRM. The Joint Economic Study updates and expands upon that data to confirm that, contrary to the Commission's original hopes and expectations, both source and viewpoint diversity have in fact been reduced under the PTAR regime. In November 1994, three program suppliers provided 89% of the non-news programming shown by affected affiliates during the access period. Two of those three suppliers -- Fox and Paramount -- are also prominent producers of prime time programming, and thus cannot rationally be considered members of the class of new program suppliers envisioned by PTAR.¹⁷ If one includes the access programming distributed by Warner Brothers, another major prime time program supplier whose debut was scarcely spawned by PTAR, the total rises to 96%. As for source diversity, therefore, the fair conclusion is that PTAR may be credited with the creation of one dominant syndicator, King World, which specializes in developing programming for the captive market created by the Rule. What is

¹⁶ 1993 Fin/Syn MO&O at 3308. CBS will not dwell in these Comments on the absence of economic justification for the adoption of PTAR in the first place. We respectfully note our disagreement, however, with the assertion that "[i]n 1970, there was a strong case for taking government action to correct the effects of an imbalanced market." Notice at ¶32. CBS concurs with then-Chairman Burch's belief that the Rule was fundamentally flawed at the outset from an economic perspective, and that, with specific reference to the off-network provision:

"[T]he Commission ... has no data whatsoever as to the economic impact of the [off-network provision].... [E]conomics is what this rule is all about, and the Commission should at least have had up-to-date information in this field before acting." PTAR I, 23 F.C.C. 2d 382, 415 (1970).

¹⁷ Joint Economic Study, Appendix H, Table H-2, p. 134.

not at all clear is that the addition of this extra program supplier, or even perhaps a few others, represents a net increase in the diversity that would otherwise have been realized if an unfettered program supply marketplace had been permitted to operate during the 25 years that PTAR has been in effect.

Although viewpoint, or program content, diversity is not amenable to quantification, there is no doubt that it has dramatically decreased in the access period by comparison with the network-distributed programming that PTAR displaced. One apparent reason for this outcome is the universal practice of "stripping" episodes of syndicated programs, so that only one such syndicated series appears on a station at a given time throughout the week.¹⁸ There is obviously nothing that the Commission can or should do by regulation to interfere with a programming marketplace that operates in this manner. It does demonstrate, however, how misguided in retrospect was the Commission's 1970 judgment that viewpoint diversity would be increased by flatly prohibiting network-delivered or off-network programming during one hour of prime time.

The NPRM also inquires whether pre-PTAR suppliers of access period programming -- i.e., networks and owners of syndication rights in off-network programming -- may have reacted to the Rule simply by distributing their programming in other dayparts, thereby limiting the supply of "independently produced" programming in those dayparts and

¹⁸ As the Network Inquiry Special Staff noted fifteen years ago, the higher transaction costs and the inherently less efficient nationwide distribution of syndicated programming in the access period may have contributed to the "stripping" phenomenon, since stripping can result in scale economies and reduce per-episode transaction costs. Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation (1980), Volume II at 420-21.

contributing to a net decline in source and program diversity throughout the broadcast day. (¶34)¹⁹ The answer is that off-network programming is generally too expensive to justify its scheduling in periods other than the access period, which, next to the 8-11 PM period, produces the highest per-unit advertising revenue. For this reason, CBS's owned stations rarely schedule off-network programming in the non-prime time period where the Rule permits it. As for network-distributed programming, the weekly non-prime time schedules offered by the three original networks to their respective affiliates have been reduced since 1977 by about 25 hours -- a figure which dramatically illustrates the increasing willingness and ability of affiliates to choose non-network program sources generally.²⁰

In any case, repeal of PTAR is unlikely immediately to alter the marketplace dynamics, set in motion by the Rule, which have made syndication the predominant program distribution mechanism for the access period. In this regard, the data show -- conclusively, in our view -- that there is no reason to believe that being forced to operate in a freely competitive market will adversely affect King World, much less threaten the health of the first-run syndication industry in general. Under such a free marketplace regime, independent stations will simply buy and use first-run syndicated programming to compete with any off-network programming that migrates to network affiliates. Indeed, as the Joint Economic Study reports, such first-

¹⁹ We emphasize again that the Commission has decisively found in the fin/syn proceeding that network market power in the program supply market does not exist, so it cannot be presumed that network-distributed and off-network programming does not contribute to source and program diversity. Indeed, the Commission has decided in the fin/syn proceeding that its fin/syn rules operated to increase concentration in the program supply market, and to reduce diversity by limiting the available sources of financing to new producers. 1993 Fin/Syn MO&O at 3310-11.

²⁰ Joint Economic Study at Appendix D, Table D-2, p. 91.

run programming already constitutes 39% of the prime time program material on non-Fox independents in the top-50 markets.²¹ In addition, affiliates in markets below the top-50 now schedule first-run programming in 54% of access period time slots, even though off-network programming is available to them.²² This preference on the part of network affiliates unrestricted by PTAR is corroborated by older data cited in the NPRM.²³ There is thus every reason to believe that first-run syndicated programming will retain a prominent position in the program supply marketplace, in the access period and in prime time generally.

On the other hand, repeal of the Rule is certain to result in a marketplace determination of the true value of first-run and off-network programming -- an outcome which will necessarily have a salutary effect on source and viewpoint diversity for the access period and for prime time generally, since a market-based price for off-network programming will encourage entry into production of programs for network exhibition (because the rights to eventual off-network syndication will be more valuable in the aggregate). This new diversity will be enhanced further by the ability of networks to syndicate off-network and first-run programming both to affiliates and independent stations after the November 1995 sunset of the fin/syn rules.

In connection with the latter point, the Notice asks commenters "to address the question of how the fin/syn changes will affect [the Commission's] assessment of network

²¹ Joint Economic Study at 50.

²² Joint Economic Study at Appendix H, Table H-1, p. 133.

²³ "In the second half hour of the access period in markets 51-75, affiliates choose first-run programming over off-network programming 65% of the time." Notice at n.42.

power in the PTAR context." (§39) The short answer, as the Joint Economic Study definitively demonstrates, is that network "market power" in program production, distribution and consumption is simply no longer an issue in any context, and network regulation can no longer be justified on theories of individual or collective network "dominance." Networks continue to compete as vigorously with each other as they always have, and they are now faced with burgeoning competition in every market in which they operate. This marketplace transformation has become so clear that it is unlikely to the point of implausibility that "fin/syn changes" or any other deregulatory initiatives will reverse this trend.

Finally, the Commission asks whether, in order to further PTAR's goal of encouraging independent program production, the Commission should consider "direct limits on the amount of in-house programming that the networks could distribute to other affiliates."

(§54)²⁴ Following a complex and protracted proceeding which rested on a voluminous record, this Commission recently decided that the network program production limits it initially proposed and adopted in the fin/syn proceeding were inappropriate. The Commission recognized both that network-produced programming in fact contributes to diversity in the video marketplace, and that networks have neither the ability nor the incentive to "convert wholesale" to in-house productions.²⁵ Under these circumstances, CBS suggests that the

²⁴ It is not clear what the Commission means by "other affiliates," but we assume that the Commission is referring to some degree of in-house production limitation.

²⁵ "[W]e do not believe the competitive, multichannel marketplace gives the networks sufficient flexibility to convert wholesale to in-house productions.... Furthermore, removal of the cap ensures that the diversity of programming that a particular network can itself provide to the market is not artificially diminished." 1993 Fin/Syn MO&O at 3311. In-house production limits were not even part of the Commission's original 1970 fin/syn regulatory regime, (continued...)

Commission should not resurrect this extraordinarily intrusive regulatory proposal in the context of this proceeding. We note in any case our firm belief that limits on network program production would be unconstitutional.

II. PTAR Is Not Necessary As a Device To Limit Networks' Ability to Dictate Affiliates' Programming Choices.

As noted above, the three-hour limitation on the broadcast of network-distributed programming by network affiliates in the top-50 markets rests wholly on the notion of the "dominance" of the three original networks over their affiliated stations. According to the 1970 Commission, this dominance required government intervention to insure that "television licensees [would be able to] exercise more than a nominal choice" in selecting their programming.²⁶

The component of PTAR which prohibits broadcast of off-network programming by affected affiliates in the access period, and the interpretation of the Rule which appears to construe first-run programming produced by ABC, CBS and NBC as "network" programming even though it has never been distributed by a network, directly damage CBS as a competitor today. We acknowledge that, by contrast, repeal of the Rule's basic three-hour restraint, which as a practical matter prohibits the CBS Television Network from distributing more than three hours of programming in prime time, would not immediately influence CBS's business,

²⁵(...continued)
and the inclusion of this new constraint as part of the short-lived 1991 "relaxation" of those rules was never adequately explained. Schurz Communications Inc. v. F.C.C., 982 F.2d 1043, 1050 (7th cir. 1992).

²⁶ PTAR I at 397.

because CBS has no present plans to offer more prime time network programming than we do now.²⁷ CBS believes nonetheless that the Rule should promptly be repealed in its entirety, because an outdated and insupportable theory of "network dominance" should no longer be used as an excuse for any special regulation of broadcast television networks, including regulation which arbitrarily limits the ability of networks and their affiliates to agree on the hours during which network-supplied programming will be offered to those affiliates.²⁸

The Joint Economic Study describes the network-affiliate relationship as one which, like all contractual relationships, is designed to increase the overall return of the contracting parties, and generally to maximize the joint benefits of the affiliation. As explained in the Joint Economic Study, the public also benefits directly from this relationship, because the efficiencies inherent in the network/affiliate distribution system result in the universal availability of regular schedules of high quality, expensive programming. Because of these efficiencies, there is nothing surprising or suspect about high affiliate clearance rates for prime time network programming, and high prime time clearance rates do not imply that top-50 market affiliates (or affiliates generally) have only "a nominal choice" in selecting their

²⁷ Even so, the competitive health of the access period program supply marketplace would be immediately enhanced by the availability of first-run network-distributed programming as a potential alternative to off-network and first-run syndicated programming -- programming that we believe will continue to thrive in the access period.

²⁸ The NPRM suggests that repeal of the three-hour limitation should be supported by an affirmative showing by proponents of repeal that the limitation "is impairing their ability to serve the public interest." Notice at ¶44. CBS respectfully suggests that the issue is more appropriately framed by asking whether PTAR (including the three-hour limitation) continues to serve a public interest purpose. If, as we believe, the Rule is an anachronism in a marketplace in which government protection of top-50 market affiliates from dominance by their network partners is simply unnecessary, the Rule should be repealed.

programming.²⁹

In any case, affiliates do in fact choose against clearing network programming offerings, both in prime time and in other dayparts. Non-clearance decisions, one-time-only preemptions, and especially delayed clearance decisions, are often made by affiliates, despite the vigorous entreaties of their network partners. A recent example is afforded by CBS's experience with THE LATE, LATE SHOW WITH TOM SNYDER, which the CBS Television Network began offering to its affiliates in January 1995. While the broadcast was immediately well-received critically, and has been a popular success in the markets in which it has been carried on a live basis, affiliates serving more than 40% of national television households have insisted on delaying the broadcast. Although the total national household coverage on a live or delayed basis is gradually increasing, and is now about 91%,³⁰ the difficulty encountered by the network in obtaining live carriage belies any notion of undue network power over affiliates' programming and scheduling decisions.³¹

The reduction over time in the total number of hours in network-distributed program schedules is the direct result of affiliate preferences for non-network programming in those dayparts, and is facially inconsistent with the notion that affiliates' program choices are anticompetitively limited by their networks. For example, in September 1993, CBS ceased

²⁹ Joint Economic Study at 21-23.

³⁰ Nielsen Television Index.

³¹ CBS's main recent difficulty with delayed clearances has been in the "late night" daypart. Similar protracted and difficult negotiations were required to improve the live clearance rate of THE LATE SHOW WITH DAVID LETTERMAN following its introduction in August 1993. It is our understanding that delayed clearance issues more frequently arise with regard to the daytime schedules of ABC and NBC.

supplying network programming to its affiliates between 10 and 11 AM. CBS's abandonment of this time period was caused by the unwillingness of a sufficient number of affiliates to clear the programming being offered. The percentage of national household coverage by affiliates clearing the 10-10:30 AM portion of that hour decreased from 90% in 1986 to 49% at the time the decision was made to abandon the hour. National coverage for 10:30 to 11 AM decreased from 84% to 61% over the same period.³² A similar problem of non-clearance caused the abandonment of the 4-4:30 PM time period by the CBS Television Network in September 1986. Thus, despite the overall mutual interest of networks and their affiliates in a strong and extensive high-quality network schedule, there has always been a creative tension between them -- a tension inconsistent with the notion that programming choices by affiliated stations are "dictated" by their network partners.

In today's video marketplace, of course, new and powerful forces have fundamentally altered the competitive context of the network/affiliate partnership. Not only do the affiliates of ABC, CBS and NBC now have "more than a nominal choice" in selecting individual programs, they have "more than a nominal choice" in alternative network partners. The willingness and the ability of ABC, CBS and NBC affiliates to terminate their existing relationships in favor of new arrangements with Fox, or with another of the three original networks, was dramatically demonstrated in the aftermath of the May 1994 announcement of the agreement between Fox Television and New World Communications to form new station affiliations and other joint operations. By a recent count, the Fox/New World deal will have generated, directly or indirectly, 68 changes of network affiliations in 37 markets, including 21

³²

Nielsen Station Index.

instances in which an affiliate of ABC, CBS or NBC ended, or will soon end, its association with one of those networks in favor of a relationship with Fox.³³

Despite these recent dramatic developments, the NPRM posits that "individual stations appear to have a greater inherent need for the benefits of network affiliation (i.e., a ready supply of proven programming) than a network does for an individual affiliation." (§43) In the past, this may have been a plausible generalization -- for example, in some television markets with large and competitive independent stations presumably eager to be offered an affiliation with one of only three networks.³⁴ It is a flatly implausible generalization today, when a fourth, a fifth and a sixth deep-pocketed company each stands ready, willing and able to offer sufficient financial incentives to sign up successful independent stations and affiliates of ABC, CBS and NBC to long-term program distribution agreements.³⁵

CBS's experience in the wake of the Fox/New World announcement has made it painfully clear to us that establishing new affiliation relationships, and maintaining existing ones, is an expensive proposition involving very difficult negotiations. It appears we are not alone in this recognition. The three original networks reportedly will now pay over

³³ Broadcasting and Cable, December 5, 1994 at 50-56.

³⁴ It is worth noting that "bargaining power" is not equivalent to "market power" that can connote anticompetitive behavior. Business transactions in the most competitive markets typically involve parties with unequal bargaining power.

³⁵ Given the technology and economics of simultaneous national satellite delivery of "syndicated" programming, the lines between traditional television networks and syndication companies have blurred. As Fox has proven by limiting its prime time network schedule to 15 hours (which, not coincidentally, frees it from PTAR), it is not necessary for a new "network" to provide as comprehensive a schedule as ABC, CBS and NBC in order to compete effectively for affiliates.

\$200,000,000 in additional compensation to their affiliate bodies as a result of this one series of realignments.³⁶ CBS fully expects this change in the competitive balance of power to be a permanent feature of network/affiliate relations in the future. At the same time, we also expect that, in this new environment, networks and their affiliates will find it in their mutual interest to find creative ways of developing and strengthening their free national distribution system.

While it may be unpleasant for CBS, enhanced competition among networks and syndication companies seeking simultaneous national distribution is certainly in the public interest, even if it temporarily disrupts existing affiliate relationships. But is also certainly in the public interest that a regulatory scheme, including PTAR, which disadvantages ABC, CBS and NBC and their affiliates vis-a-vis these increasingly fierce competitors be revisited without delay, and that the barriers to full and fair competition be lifted.

III. The Commission Should No Longer Use PTAR To Subsidize "Independent" Stations In the Name of Diversity.

As the Notice acknowledges, PTAR "provides independent stations with a competitive advantage over competing network affiliates." (§45) With regard to off-network shows, that competitive advantage is financed primarily by the owners of network programming, including both networks and outside producers, who are unable to gain full value from their creative efforts because the purpose and effect of the Rule is to restrict the market in which the syndication rights to their programming can be sold. According to PTAR's defenders, this

³⁶ Broadcasting and Cable, December 19, 1994 at 34.

skewing of the marketplace to favor one set of participants is justified because it compensates for a technological disadvantage suffered by UHF independents in general, and because it is substantially responsible for the economic health and continued viability of independent stations and new networks. The NPRM notes that this "outlet diversity" argument was not part of the Commission's original rationale in adopting PTAR (§14), but is now asserted as a basis for retaining it. Holding aside the underlying policy question as to whether the government should be "picking the winners and losers" among the individual licensees it regulates, particularly for such speculative and unlikely benefits, the argument is fundamentally flawed in several respects.

While the competitive advantage bestowed by PTAR upon top-50 market independent stations has certainly had a salutary effect on the bottom lines of some of these stations since 1970, the principal contributors to the health and success of these outlets have been increases in cable penetration, a growing television advertising market, and efficient national delivery of syndicated programming by satellite.³⁷ There is no evidence whatsoever that PTAR has been responsible for the birth or the survival of any television station. In fact, sharp growth in the numbers and the revenues of independent stations began in the late 1970's, which was long after PTAR was adopted, but which correlates directly with the growth in cable penetration following the introduction of satellite-delivered cable program services.³⁸ In addition, the "UHF handicap," insofar as it has been cited to help justify PTAR's purpose and effect to

³⁷ OPP Working Paper at 4012.

³⁸ Joint Economic Study at 8. It is unlikely that evidence of a connection between PTAR and independent station survival could ever be found to exist. Id. at 55.

discriminate in favor of independent stations, can empirically be shown to be substantially a thing of the past.³⁹

Assuming -- wrongly, we believe -- that PTAR historically contributed to the viability of independent television stations, the Notice inquires whether "PTAR [is] still necessary to ensure such [outlet] diversity." (§46) Even accepting the historical assumption, CBS believes that the clear answer is the PTAR subsidy is not necessary today. The dominant marketplace influences noted above have produced an irreversible leveling of the technological playing field, and an increasingly favorable business environment for stations not affiliated with ABC, CBS or NBC.⁴⁰ The Joint Economic Study explains in some detail the circumstances of "independent" television stations in today's marketplace in relation to UHF and VHF network affiliates.⁴¹ It forcefully demonstrates that the vastly increased population of commercial "independent" television stations⁴² is not comprised of the struggling small businesses that the Rule has been retroactively justified as protecting, and is certainly not in need of a continuing subsidy from affiliates and off-network program producers to survive and to thrive.

As one review of the available data has shown, there are today only a handful of

³⁹ Joint Economic Study at Appendix C.

⁴⁰ The "infant industry" argument summarized in the NPRM provides no additional theoretical or practical justification for PTAR. Notice at §48. In any case, "infant industry" protection involves government-mandated lessening of competition in the expectation of future competitive gains. There is simply no evidence that the "infants" cited need the perpetuation of PTAR to maintain their strength and viability. Joint Economic Study at 51.

⁴¹ Joint Economic Study at 51ff.

⁴² According to the Association of Independent Television Stations, the total number of stations not affiliated with ABC, CBS or NBC has risen from 67 in 1970 to 438 in 1993. Joint Economic Study at Appendix A-2, Table A-3, p. 67.

commercial "independent" stations in the top-50 markets which are (1) not group-owned, (2) not affiliates of the Fox, United Paramount or Warner networks, and (3) appear to be at least potentially in the market for off-network programming in the access period.⁴³ Even if PTAR does now somehow serve to prop up one or more of those few remaining independent stations without a new network affiliation or the substantial financial resources of a group owner, CBS believes that intrusive economic regulation like PTAR can no longer be justified as a device to pick winners and losers, in an effort to squeeze the last ounce of "outlet diversity" out of a marketplace that is exploding with video alternatives.⁴⁴ We believe it is appropriate for the Commission to be interested in maintaining and improving outlet diversity, as well as source diversity, for the approximately 30% of television households who presently rely exclusively on free, over-the-air broadcasting for their viewing.⁴⁵ Even these households, however, have about twice as many video alternatives than they did in 1970,⁴⁶ a fact which on its face argues for the reconsideration of the premises of PTAR and other diversity-based regulations which date from an era whose marketplace conditions are now extinct.

⁴³ Comments of the Coalition to Enhance Diversity, MM File No. 870622A et al., June 14, 1994 at 18ff.

⁴⁴ As the Joint Economic Study explains at pp. 31ff., the discriminatory effect of PTAR also has adverse effects on viewer welfare that can be quantified in economic terms.

⁴⁵ This 30% figure is certain to trend downward as new technologies such as DBS and telco video distribution become established, possibly exceeding the ability of regulatory policy to keep pace.

⁴⁶ "[Sixty-five] percent of television households had access to six or more broadcast channels in 1970; in 1993, 70 percent of all television households received 11 or more over-the-air channels." NPRM at ¶16 (citations omitted). In the same year, the average television household could receive 13.3 stations. Joint Economic Study at 59.